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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1957

NO. 629 MISC.

ROBERT LEE JACKSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Ohio, Respondent herein, and presents its brief in opposition to the petition heretofore filed herein praying a Writ of Certiorari to the Supreme Court of Ohio from its denial of petitioner's Motion For Leave To Appeal to that court.

I. THE PETITION IS NOT WITHIN THE REVIEWING POWER OF THE SUPREME COURT OF THE UNITED STATES.

The petition for a writ must be based upon Section 1257 of the United States Code. There is no showing here, nor is

it claimed, that petitioner seeks a review from a final judgment of the Supreme Court of the State of Ohio on his state and federal questions; that he sought such a review there; had such a review there; or gave the State Supreme Court opportunity or authority to pass upon the questions now propounded.

Petitioner, by state constitutional provision and statute, was entitled to, and must first, raise his constitutional questions by filing his appeal as of right in the highest state court according to the due process therein provided. Failing to do so he is not entitled to a Writ of Certiorari seeking a review of a judgment of the state court on alleged errors of law not involving rights claimed under the Constitution of the United States of Ohio.

Article IV, Section 2, of the Ohio Constitution provides petitioner's right to an appeal on both state and federal constitutional questions. *Sections 2953.08 and 2505.29 of the Revised Code of Ohio* provide the method. — which right and method petitioner has left untried. (Appendix B)

II. PETITIONER'S QUESTIONS ARE LIMITED TO A CONSIDERATION OF THE 14th AMENDMENT OF THE UNITED STATES CONSTITUTION.

The so-called "Bill of Rights" or first eight Amendments to the federal constitution are not designed as limits upon state law or government in reference to citizens, but always have been and still are considered exclusively as restrictions upon the power of the federal government.

Carter v. Illinois, 329 U. S. 173
Brown v. Allen, 344 U. S. 343
Griffin v. Ill., 351 U. S. 12
McNabb v. U. S. (obiter), 318 U. S. 322
Stackum v. State, 106 O. S. 249

Stephenson v. *State*, 119 O. S. 349
Brown v. *Cleveland*, 125 O. S. 455
State v. *Lindway*, 131 O. S. 166
(appeal dismissed — 299 U. S. 506)
State v. *Knight*, 77 O. App. 214
(cert. & rehear. denied 327 U. S. 808 and 328 U. S. 878)
Re Burson, 86 O. App. 404
(Cert. den. 339 U. S. 969)
Club v. *Caspersen*, 193 U. S. 189

The above are but a few of the great number of both state and federal decisions which all point conclusively to the proposition that petitioner's questions here are limited, if appropriate for review at all, to a consideration of the effect upon state procedures of the due process clause of the federal constitution.

III. THE PROCEEDINGS IN THE TRIAL COURT WERE CONSONANT WITH DUE PROCESS AS DEFINED FOR STATE PRACTICE BY THIS COURT.

Alleged Illegal Search

As to the alleged illegal search and seizure, the record shows that within twenty-five minutes of the killing police were looking for the defendant (whom they then knew only as "Hambone"), at his residence. (R. 263). They asked the defendant where "Hambone" lived and were directed by "Hambone" himself (later known as Jackson) to his own apartment. They then learned that "Hambone" and Jackson were the same person. They returned to the apartment and were admitted by Jackson's wife. They made a search and found the deceased's card case. (R. 265). They left and immediately returned with a Homicide Squad Detective. A further search produced part of the robbery loot,

pertinent parts of clothing, bullets and a gun hidden in the refrigerator mechanism. (R. 267). Mrs. Jackson was present at all times according to the police and her denials at the trial of this particular series of events were, on rebuttal, in turn denied by a voice recording taken from her the same night.

The court will bear in mind that the articles were found in the Jackson apartment shortly after midnight, within an hour of the killing and as part of an immediate and widespread hunt for loot taken in the robbery, the guns used and for a known two, probably three, and (at that instant) possibly four persons, — the fourth being Mrs. Jackson herself who was in the apartment at all times when the "deal" to rob was made, the guns furnished by Jackson, the subsequent clothes change by Jackson and the hiding of the loot and other evidence. She was taken to headquarters, confronted with her husband, interrogated and finally released as soon as police became convinced that she had merely seen the men and heard mumbled conversations.

Regardless of the fact that the courts of Ohio have consistently followed a non-exclusionary rule, as exemplified by, but not limited to, *State* v. *Lindway*, 131 O. S. 166, this record is conclusive that the search was conducted at or about midnight, immediately after the killing and upon bona fide belief and information. It was done without protest by the lady of the house who was herself a logical suspect and it produced items definitely linking your petitioner with the robbers and vital to the apprehension and identification of the felons and a fugitive.

Statements Against Interest

As to Jackson's confessions and statements against interest, the record shows that while Jackson was apprehended about two hours after the killing, he had already slipped away from the police twice, — once within seconds at the

scene and again at ' .s apartment by denying his own identity. He again denied his own identity when stopped in a Kentucky bound taxicab at a bridge road-block. By this time police knew that at least three persons, and possibly more, had perpetrated the conspiracy leading to the robbery-murder, — and the third (named Lem or Son Trotter) was still at large. As a matter of fact, this was the trigger man and he successfully hid out for fifteen months after evading the same bridge-block that caught Jackson.

After an almost immediate identification of Jackson by the wounded Barnett in the hospital, much of the interrogation of Jackson was directed towards the habits, associations, and possible whereabouts of Trotter. That Jackson was fully aware of this is indicated by the testimony of the police reporter for one of the local newspapers who spoke to Jackson after he gave police his first statement. "Why did you change your story now?" Answer — "I don't know. Lem (i. e. Trotter) got away." (R. 699). And so he did for fifteen months, all ably abetted by your petitioner.

The court will bear in mind that Jackson is not the dull, retarded, inexperienced, frightened individual whom the court has found it necessary to single out from case to case. Jackson was about 45 years old and, although he claimed a fifth grade education only, he had live ' in Cincinnati for nine years, had been regularly employed in skilled or semi-skilled labor, had a substantial bank account, was well known in his neighborhood as an occasional dancer and entertainer and had previous brushes with the law like burglary, "taking a guard's gun", robbery, and carrying concealed weapons (a knife). His testimony is lengthy, alert, responsive. He seemed to understand all proceedings and questions thoroughly. His answers indicated an active, intelligent and shrewd (albeit lying) mentality.

The court has repeatedly reached the conclusion ever since *Lisenba* v. *California*, 314 U. S. 219, that due process, particularly in regard to alleged involuntary confessions, duress, and interrogation during detention, depends to some degree upon the person claiming deprivations, — his status, background and experience. There is no doubt but that your petitioner, Jackson, the man, is in the shoes of Stein, Cooper, and Wissner, of *Stein* v. *New York*, 346 U. S. 156, rather than those of Haley, the boy, in *Haley* v. *Ohio*, 322 U. S. 596, or Fikes, the boy away from home, in *Fikes* v. *Alabama*, 352 U. S. 191.

In the trial court, the defendant's claims of an involuntary confession were thoroughly aired twice, — once before the judge alone and once before the jury. Both times the defendant himself was fully heard, together with other witnesses, pro and con, including lay persons. Testimony regarding the admissibility of Jackson's statements, the various statements themselves, and matters immediately related to them, consumed approximately 239 pages of the record.

The judge instructed the jury on the purpose, weight and effect of statements against interest, as well as statements of confederates.

As To Lack Of Counsel

While petitioner cites no specific authority in this respect that might apply to his particular circumstance, it should be noted that his wife was held for twelve hours only. She knew petitioner's whereabouts and position. She was known about town and among friends, as was her husband. She was not without funds to employ counsel, nor was he. He was afforded an opportunity to call counsel. He was not held incommunicado. He was kept between several interrogations in an open, "bullpen" area with ready access to others. In routine operations he was moved from

time to time about the City Hall. He was taken once to a hospital ward several miles distant to see Barnett. He saw, was seen by, and spoke to newspeople and others. At no time did he seek or request assistance or counsel.

As To Co-Defendant Barnett

Petitioner complains of the admission in evidence of a joint interview between a police officer, himself and co-defendant, Barnett, two and a half days after the murder when Barnett was sufficiently recovered from his gun shot wound to be released from the hospital. The interview was recorded by a public stenographer who read her shorthand notes into the trial record at petitioner's insistence. Jackson and Barnett were sworn by the stenographer as if on affidavit. Questions were asked of each; answers and even occasional denials were given by each. Each was asked to confirm or deny statements made by the other and did so. On various questions one or the other would fail or refuse to answer. All proceedings were meticulously and minutely recorded, whether they tended toward guilt or innocence, admission or denial. Questions were "loaded", as petitioner states, only in the sense that they were leading.

It is difficult to conceive, short of open court, formal proceedings, how a fairer, more accurate and more reliable police interview with two suspects could be had. The practice of admitting into evidence whatever pertinent statements are made, or acts done by, or in the presence of a defendant, is allowable not only by long established principles, but specifically, in part at least, by *Section 2945.55 of the Revised Code of Ohio*. (Appendix B)

As to Barnett's Status

At the time of the Jackson trial, co-defendant Barnett was a patient in the Lima State Hospital by virtue of his counsel's prior suggestion of insanity to the court and the court's determination upon psychiatric examination and hearing that Barnett, *about seven months after the offense*, was not then sufficiently sound to understand the nature of the charge against him, to consult with counsel and to assist in his own defense. This is the standard required in pre-trial proceedings by *Section 2945.38 of the Revised Code of Ohio*, and by *State, ex rel. Townsend* v. *Bushong*, 77 O. App. 464 (affirmed 146 O. S. 271). So far as it was known or established at the Jackson trial, Barnett was "insane", as now claimed, only in the very broadest or loosest vernacular sense of the word.

The court is undoubtedly aware of the great distinction between the legal requirements for a competent defendant and a competent witness. Barnett, even if called by either side pursuant to Section 2945.50 of the Revised Code of Ohio could at the time of the Jackson trial have been a competent witness. The record is specific that the petitioner was aware on trial of his right to have Barnett or his testimony in court, — petitioner's counsel at several points stating categorically that they would have Barnett present. He did not choose to exercise his right in this respect, — possible because, of course, Barnett could not be compelled to testify, but possibly also because he could be found competent and might seriously damage the defense by repeating in open court, under oath and before petitioner's jury, a first hand version of the murder and its preliminaries.

CONCLUSION

Copies of the pertinent portion of all record citations herein are attached as Appendix "A". Copies of the pertinent portion of all sections cited of the Revised Code of Ohio are attached as Appendix "B".

The State of Ohio, in opposing the Writ for Certiorari, submits to the court:

I. The Petition is not within the purview of Section 1257 U. S. C.;

II. The federal question, if any, is limited to the impact of the Fourteenth Amendment on state proceedings;

III. Alleged matters of illegal search and seizure, unlawful admission of statements against interest; lack of counsel; incrimination by a co-defendant; and claimed incompetency of the co-defendant as a witness either do not fit previous adjudications of this court or do not constitute an infringement of a guaranteed right or privilege, or a bar to a fair, orderly and honest trial.

C. WATSON HOVER,
Prosecuting Attorney,
MELVIN G. RUEGER,
Ass't Prosecuting Attorney.

APPENDIX A

OFFICER HARRY BATTER — (R. 263)

A. "Sitting right here (pointing). And I asked him if he knew anybody in that building that weighed about 200 pounds, six feet tall, and they called Ham Bone, and he says, 'No', that he didn't know anybody, because he didn't mix much with the neighbors or anybody in the building, although there was a man that lived on the first floor, in the front, and he thinks they did call him Ham Bone; and we asked him where he was going at the time. He said he was going to work, and I asked him where he worked. He said he worked at the Green Lines, and he said he was going to stop up and get something to eat and go to work."

* * *

(R. 264)

A. "I went back to the second floor and knocked on the door and Mrs. Jackson got up and opened the door."

* * *

(R. 267)

A. "I continued to look around the apartment and then I found an album there in the apartment that had pictures of Mrs. Jackson, Robert Jackson, and other people in there, and I took that album and the pictures and the wallet and the pants, and went up to the City Hall and showed them what I found down there, and then I went back down there with Detective Green, back to the home, and we searched the home again for a gun and I had to take a knife and force the top of the refrigerator up.

Q. "Just a moment. Will you tell us how you searched that home and in what manner you searched it?

A. "Detective Green was going ahead of me and I was following him and looking every place that we didn't miss anything, and I took and opened the top of the refrigerator, and in top of the refrigerator was a towel and in the towel was an automatic, three bullets, and some rolls of coin, and I called Jack right away, and he said, 'Don't touch it.'"

* * *

PATROLMAN WILLIAM A. BRECKEL
(R. 245 - R. 248)

A. "When we arrived at the bridge, there was one Cincinnati patrolman, Matthias Gewer and two Kentucky police. I believe they were Covington police, and two Cincinnati park policemen. We relieved the Cincinnati park policemen, because we were on foot, and they had a cruiser standing by.

Q. "What was being done there?

A. "A roadblock had been set up at the bridge and we proceeded to carry out the roadblock."

Q. "What do you mean 'carry out the roadblock?' What is that?

A. "Stop all cars passing through that intersection leaving the City and we more or less searched every car, that is, if white or colored, we were looking for two colored men at the time and we were going over every car. We stopped every car, even buses, leaving the City.

"Along about 1:00, about 1:10, I think it was, somewhere in the neighborhood of 1:00 o'clock, we stopped a Seventh Street cab, in which a passenger was riding in the front seat.

"The cab driver gave his identification and we asked the passenger for his identification, what his name was —"

Q. "Describe how that passenger was seated in the front seat?"

A. "He was scooted down on the front seat, sitting on the right side of the cab up close to the door. The appearance that we got was he was a very short man."

MR. ROGOFF: "Objection, your Honor."

MR. SMITH: "We will object to what the appearance was, your Honor."

Q. "This is what you saw, wasn't it, officer?

A. "That's correct."

THE COURT: "I must sustain the objection."

Q. "Tell us what you saw officer?"

A. "We saw this colored man sitting in the front seat of the cab. We asked him what his name was and he said, 'Sam Brown'. I asked him for some verification of that, and he said he didn't have any identification at all on him, that he had just changed clothes.

"We asked him to get out of the cab and to keep his hands in the position where we could watch him, because he was dressed, or attired at that time in clothing that we had — similar to the latest broadcast that we had gotten as being the type worn by one of the men."

MR. SMITH: "I object to this as being hearsay, your Honor."

THE COURT: "Objection sustained."

Q. "I will put it this way, officer: Had you received a description of an individual?"

A. "We had."

Q. "Were you on the lookout for an individual?"

MR. SMITH: "I object to leading the witness."

Q. "I will ask you whether or not you were on the lookout for an individual."

MR. SMITH: "I object to that as a leading question. It is prompting the answer."

THE COURT: "Overruled."

A. "We were."

Q. "The description that you received, did it correspond with the description of the man that was in the cab?"

MR. SMITH: "That calls for a conclusion of the witness, your Honor. We object."

THE COURT: "Overruled."

MR. SMITH: "Exception."

MR. RUEGER: "You may answer."

A. "The clothing that the man was wearing was practically exact to the description that we had received; that is, he was wearing a white sport shirt with short sleeves. He had on dark pants and at the time we stopped him, he had a dark cap, a dark Federa type hat, but he was not wearing the hat at the time we stopped him. He had the hat shoved down on his knees; in the position in which he was sitting he had the hat practically up under the dashboard of the car."

Q. "Now, this man, did he get out of the car?"

A. "He got out readily."

Q. "And then what was done with this man?"

A. "We questioned him further. I guess we were about five to ten minutes questioning him and still no verification of name, and we patted him down, just a surface pat. In other words, to see that there was nothing on him, and my partner, William Haines, then took him over to the patrol box, which was about 30 yards away, at Third and Smith, and we had decided then to hold him until he could produce identification or we could produce identification of him. He was subsequently sent into Central Station."

Q. "Do you see that man that you took out of that cab here today?"

A. "That is the man."

Q. "Who? Which man?"

A. "The second man here (pointing)."

Q. "Do you know who he is now?"

A. "I know who he is now, yes."

Q. "Who is he?"

A. "That is Mr. Jackson."

* * *

FRANK WEIKEL, NEWSPAPER REPORTER
(R. 698 - 699)

A. "I identified myself to Mr. Jackson as an Enquirer reporter. I said, 'I understand that you have changed your story from last night,' and he replied, 'Yes'. I said, 'Now do you admit furnishing the guns used in the holdup?' He again replied, 'Yes'."

MR. SMITH: "We are going to object to this, if it please the Court."

THE COURT: "Objection overruled, you may note your exception."

A. (Continuing.) "I then asked, 'Well, did you have any part in the holdup?' He said, 'I did not go into the holdup, I was outside.' I then asked background material that I was interested in for a story, on his acquaintanceship with Barnett and Lemuel Trotter and I ended the interview by asking him 'Why did you change your story now?' He said 'I don't know. Lem got away.' Now it was either Lem got away or Trotter got away, I don't remember which."

Q. "You don't remember which word?"

A. "Whether it was Lem or Trotter. I said, 'Is there anything else you can tell me?' He said, 'No, they had it all last night.' That concluded the inquiry."

Q. "You left the cell block?"

A. "I left the cell block to go write the story, yes, sir."

* * *

APPENDIX B

CONSTITUTIONAL AND STATUTORY REFERENCES

OHIO CONSTITUTION OF 1851, ARTICLE IV SECTION 2, SUPREME COURT (as amended November 7, 1944).

"* * * It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and *appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state* as cases of right as may be fost obtained. * * *"

SECTIONS CITED OF THE 1953 REVISED CODE OF OHIO

Section 2953.08 (Criminal Procedure) Appeal Filed in Supreme Court:

"An appeal shall not be filed in the supreme court except upon good cause shown, upon motion and notice to the prosecuting attorney and the attorney general, as in civil cases, or unless such motion is allowed by the supreme court, or, in capital cases by two judges thereof, or in other cases by one judge thereof. *In cases involving questions arising under the constitution of the United States, or of this state, such leave is not necessary.*"

Section 2505.29 (Procedure on Appeals) No appeal Filed Without Leave of Supreme Court, exceptions:

"No appeal shall be filed in the supreme court unless such court or a judge thereof grants leave to file such an appeal. *Such leave need not be obtained to file*

an appeal as to the judgment or final order of the court of appeals, or a judge thereof, *in cases involving questions under the constitution of the United States, or of this state*, in cases which originated in the court of appeals, and as to proceedings of administrative officers as may be provided by law."

Section 2945.55 (Trial) Testimony of Previous Identification:

"When identification of the defendant is an issue, a witness who has on previous occasion identified such person may testify to such previous identification. Such identification may be proved by other witnesses."

Section 2945.38 (Trial) Proceedings on Finding or Verdict (after pre-trial suggestion):

"If the court or jury finds, upon the hearing provided for in section 2945.37 of the Revised Code, that the accused is sane, he shall be proceeded against as provided by law. If the court or jury finds him to be not sane, he shall be forthwith committed by the court to a hospital for the mentally ill within the jurisdiction of the court. If the court finds it advisable, it shall commit such person to the Lima State Hospital until he is restored to reason, and upon being restored to reason the accused shall be proceeded against as provided by law."

UNITED STATES STATUTES CITED

Title 28, Section 1257, United States Code (Supreme Court-Jurisdiction) State courts; appeal; certiorari:

"Final judgments or decrees rendered by the highest court of a state *in which a decision could be had*, may be reviewed by the Supreme Court as follows: * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in

question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."